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No. 84-1419

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT JAMES MAKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the dismissal of a mail fraud indictment, based on the erroneous legal conclusion that an indictment charging a single fraudulent scheme must allege that the entire scheme was planned in advance, constituted an acquittal immune from appeal under the Double Jeopardy Clause.

2. Whether the indictment correctly charged a single fraudulent scheme.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 751 F.2d 614.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1984. The petition for a writ of certiorari was filed on February 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On September 30, 1982, petitioner and co-defendant Constance Sullivan were indicted in the Western

District of Pennsylvania on 18 counts of mail fraud, in violation of 18 U.S.C. 1341 and 2, in connection with a scheme to defraud three insurance companies. The district court dismissed the indictment. The court of appeals reversed and reinstated the indictment (Pet. App. 1a-30a).

The indictment charged that petitioner and Sullivan filed false claims arising out of two automobile accidents in which petitioner was involved in March 1976 and in August 1977. Specifically, the indictment charged that petitioner received $95,000 to compensate him for lost wages by misrepresenting his employment history and falsely stating that he was unable to work after the accidents. The indictment further charged that petitioner used an alias and false social security numbers to conceal from the insurance companies the fact that he worked as a boilermaker during periods for which he claimed wage-loss benefits. Pet. App. 3a-9a.

2. The proceedings in the district court are detailed in the opinion of the court of appeals (Pet. App. 9a-13a). After the jury was sworn, co-defendant Sullivan moved to dismiss several counts that she claimed related only to petitioner. The district court reserved its ruling, and the prosecutor made his opening argument. Thereupon, the defendants requested severance so that they could cross-examine each other about certain prior statements that the prosecutor intended to introduce into evidence. Petitioner also argued that there should be two trials for each defendant because the charges relating to the 1976 accident had to be tried separately from the charges relating to the later accident. *Id.* at 9a-10a.

After reviewing transcripts of civil proceedings involving petitioner's insurance claims, the district

court granted the motion to sever the trial both as to defendants and as to the accidents. The court concluded that there were separate schemes arising out of each accident and hence that separate trials were required. The court explained that a single scheme to defraud could not be found unless the government could prove that the defendants had planned the entire scheme, notably the second accident, in advance. Based on its reading of the civil transcripts and the indictment, the court found that the government could not meet that burden because it would not show that the second accident was planned. Pet. App. 10a-11a.

The trial then proceeded with only petitioner as defendant and only on the counts relating to the 1976 accident. After a single witness testified, petitioner moved for dismissal of the indictment on the authority of *United States* v. *Camiel*, 689 F.2d 31 (3d Cir. 1982), which held that a defendant cannot be tried for multiple schemes to defraud on an indictment charging a single scheme. The district court dismissed the indictment, finding that this defect in the indictment could not be cured by severance. The court, however, denied petitioner's motion for a judgment of acquittal. The government appealed the dismissal of the indictment, the severance of the counts relating to the separate accidents, and the severance of the defendants. Pet. App. 11a-13a.

3. The court of appeals reversed and reinstated the indictment (Pet. App. 1a-30a). The court rejected petitioner's contention that the Double Jeopardy Clause barred appeal of the dismissal of the indictment. The court explained that, under *United States* v. *Scott*, 437 U.S. 82, 97 (1978), an appeal would be barred only if the dismissal were tanta-

mount to an acquittal, that is, if " 'the ruling of the judge, whatever its label, actually represent[ed] a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.' " The court held that there was no "requirement that a conviction for a single scheme to defraud must rest on a showing that the entire scheme was planned at the outset" (Pet. App. 20a). Accordingly, the court concluded that the district court did not make a factual resolution of any element of the charged offense, and hence its order was not an acquittal. *Id.* at 13a-22a.

On the merits, the court of appeals held that the district court erred in dismissing the indictment (Pet. App. 22a-27a). The court concluded that the indictment's allegations of a common purpose and method with respect to the two accidents supported a charge of a single fraudulent scheme. Therefore, the indictment should not have been dismissed. Given this conclusion, the court of appeals also held that the district court abused its discretion in ordering separate trials with respect to the two accidents (*id.* at 27a-28a).[1]

ARGUMENT

1. Petitioner contends (Pet. 17-22) that the court of appeals lacked jurisdiction to hear this appeal because a retrial would be barred by the Double Jeopardy Clause. This contention is without merit.

Petitioner relies on the statement in *Arizona* v. *Rumsey*, No. 83-226 (May 29, 1984), slip op. 8, that "an acquittal on the merits bars retrial even if based

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[1] The court upheld, however, the district court's decision to hold separate trials for the two defendants as within the allowable limits of its discretion (Pet. App. 28a-29a).

on legal error." [2] This approach simply begs the question. The court of appeals did not take issue with this statement; it did not even discuss the treatment of acquittals. Its decision rested on the conclusion that the district court's action was merely a dismissal of the indictment and not an acquittal, so that retrial is permitted under *United States* v. *Scott*, 437 U.S. 82 (1978). Petitioner advances no reason why this analysis was erroneous and, particularly, does not suggest how the court erred in concluding that this was a dismissal.

In fact, there can be little doubt that the court of appeals correctly concluded that the district court's action here was a dismissal of the indictment, not an acquittal. While not in itself determinative, the court's labelling of its action as a dismissal and its accompanying denial of petitioner's motion for a judgment of acquittal plainly indicate the district court's perception of what it was doing. There was no factual resolution of any element of the crime charged.[3] Nothing in the district court's rulings even remotely suggests a finding that the government had failed or would fail to establish that each of the charged mailings was made in furtherance of a scheme to defraud the insurers. Indeed, there were

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[2] Petitioner's intimation that this principle originated in *Rumsey*, and hence might not have been considered by the court of appeals, is quite mistaken. The Court's discussion in *Rumsey* makes clear that the statement was intended only to summarize earlier opinions, and, indeed, much of the discussion is a direct quotation from *United States* v. *Scott*, 437 U.S. 82, 98 (1978), on which the court of appeals relied.

[3] As the court of appeals held, the district court dismissed the indictment because it believed—erroneously—that there was a legal defect in charging a single scheme. See pages 5-6, *infra*.

no facts adduced in the very brief portion of the trial that occurred that played any role in the district court's decision. The defect found by the court was in the indictment itself, not the proof, and the district court's ruling could as readily have been made before as after the attachment of jeopardy. Under *Scott*, therefore, the fact that petitioner did not raise his objection until after jeopardy had attached does not entitle him to the windfall of escaping trial altogether.

2. Petitioner also contends (Pet. 23-26) that the court of appeals erred in finding that the allegations of the complaint could establish a single fraudulent scheme. There is no reason for this Court to review this completely fact-bound claim, especially at this interlocutory stage. Petitioner will be free to raise this claim again if he is convicted, at which time it could be considered in light of the evidence adduced at trial. In any event, the claim is without merit.

Single schemes to defraud are often "multi-faceted." *United States* v. *Zeidman*, 540 F.2d 314, 318 (7th Cir. 1976). As petitioner acknowledges (Pet. 24), "a common goal, operations carried out in virtually identical manner, and an overlapping of participants" are factors probative of a single scheme. *United States* v. *Rodgers*, 624 F.2d 1303, 1307 (5th Cir. 1980), cert. denied, 450 U.S. 917 (1981). Thus, the fact that there is a significant chronological distance between different incidents central to the scheme does not mean that more than a single scheme is involved. *United States* v. *DiPasquale*, 740 F.2d 1282, 1290 (3d Cir. 1984) (distinct extortion incidents involving different victims); see also *United States* v. *Robinson*, 716 F.2d 1095, 1096 (6th Cir. 1983), cert. denied, No. 83-5612 (Jan. 9,

1984), cert. granted, No. 83-613 (Mar. 4, 1985) (insurance fraud based on inflated claims arising out of more than one fire).

As the court of appeals explained (Pet. App. 25a-27a), application of these factors here suggests that the charged fraud was a single scheme. There was a single objective—obtaining wage-loss and related benefits for damages petitioner purportedly suffered as a result of the two automobile accidents. Moreover, petitioner obtained the benefits in each case by making "the same fraudulent representation about his employment history just prior to the accidents," and by "conceal[ing] his employment [during periods for which he claimed disability] from the three allegedly defrauded companies" (*id.* at 25a-26a (footnote omitted)). Finally, the indictment "alleges that the same two defendants were involved in all aspects of the scheme" (*id.* at 26a).

At any rate, even if the finder of fact were to conclude that the evidence at trial established two schemes, rather than one, such a variance would surely be immaterial in this prosecution of 18 substantive mail fraud counts. It simply makes no practical difference whether the indictment charges one or two fraudulent schemes. The question for the jury (for which petitioner must prepare his defense) is the same—whether each mailing charged in the indictment was made in furtherance of a fraudulent scheme. See generally *United States* v. *Miller*, No. 83-1750 (Apr. 1, 1985), slip op. 4-5. If a particular mailing was so made, then petitioner is guilty of mail fraud regardless of whether the particular scheme encompassed both accidents or was restricted to one. And charging the fraud as two separate schemes would not prevent the trial of all 18 counts together

because the offenses clearly could be joined in one indictment under Fed. R. Crim. P. 8(a) as offenses "of the same or similar character."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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